

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

United States of America,

Plaintiff,

v.

**MEMORANDUM OPINION
AND ORDER**

Criminal No. 05-211 ADM/AJB

Frank Leonard Penny,

Defendant.

Andrew R. Winter, Esq., Assistant U.S. Attorney, Minneapolis, MN, on behalf of Plaintiff.

Robert G. Davis, Esq., Robert G. Davis Law Office, Minneapolis, MN, on behalf of Defendant.

This matter is before the undersigned United States District Judge on Defendant Frank Leonard Penny's ("Defendant") Motion for Reconsideration of Sentence [Docket No. 58]. On February 10, 2006, Defendant was sentenced to a 110 month term for violation of 18 U.S.C. § 922(g)(1) and 924(a)(2) [Docket No. 53]. For the reasons set forth below, the Motion is denied.

Defendant moves for reconsideration of his sentence on two grounds. First, Defendant argues that the statute to which he pled guilty sets a maximum prison term of ten years. Second, Defendant argues he did not agree to a plea bargain in which he would be sentenced as an armed career criminal.

Defendant's argument that 18 U.S.C. § 922(g)(1) and 924(a)(2) call for a maximum sentence of ten years is not availing because Defendant was sentenced to less than a ten year term. Defendant was sentenced to 110 months in prison; consequently, the sentence is not violative of the statute.

Defendant is also incorrect that his plea agreement did not include a provision in which he agreed to the possibility he would be sentenced as an armed career criminal. Plea Agreement [Docket No. 39] at 4-5. Even if the Defendant had not agreed to this stipulation in his Plea Agreement, this point is moot. Following the Government's downward departure motion under United States Sentencing Guideline § 5K1.1, the Court dropped the armed career criminal designation from its sentencing calculations. As a result, Defendant was sentenced without that enhancement, and Defendant's Motion for Reconsideration is denied.

Defendant has also filed a Motion for Order to Have Defense Counsel Dismissed [Docket No. 59]. Trial defense counsel's Motion to Withdraw [Docket No. 56] is pending before the Eighth Circuit Court of Appeals. The Public Defender's office has been advised of the Defendant's conflict with trial counsel.

Based upon the foregoing, and all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that Defendant's Motion for Reconsideration of Sentence [Docket No. 58] is **DENIED**.

BY THE COURT:

s/Ann D. Montgomery
ANN D. MONTGOMERY
U.S. DISTRICT JUDGE

Dated: February 23, 2006.